No. 3062

United States
Circuit Court of Appeals
For the Ninth Circuit

EMMETT IRRIGATION DISTRICT, a municipal corporation, W. H. SHANE, N. B. BARNES and E. J. REYNOLDS as Directors, and R. B. SHAW as Treasurer of the Emmett Irrigation District, *Appellants*,

vs.

J. PAUL THOMPSON, A. N. GAEBLER, HELEN M. CONRAD, S. H. HUDSON, HENRY M. WILLIAMS, CHARLOTTE H. SHIPMAN, F. W. HORTON, MARY C. WADDELL, J. WILLIS GARDNER, LINCOLN UNIVERSITY, a corporation, CHESTER COUNTY TRUST COMPANY, a corporation, NATIONAL BANK OF OXFORD, a corporation, for themselves and all other bondholders of Emmett Irrigation District, similarly situated,

Appellees.

BRIEF OF APPELLEES

On Appeal from the District Court of the United States, District of Idaho, Southern Division.

RICHARDS & HAGA,
McKEEN F. MORROW,
Solicitors for Appellees,
Residence: Boise, Idaho.

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STATEMENT OF THE CASE

The statement of the case as set forth in appellants' brief is substantially correct, and we shall confine our statement to a brief review of the controlling facts as they appear to us. For brevity we shall re-

fer to the appellant Emmett Irrigation District as simply the "District."

It is conceded that the District was organized in 1910 for the purpose of purchasing, holding and operating an extensive canal system constructed by the Canyon Canal Company, Limited, under a contract with the State of Idaho and the Act of Congress commonly known as the Carey Act. The District planned to make certain improvements on and enlargements and extensions of the system. Immediately after its organization it authorized an issue of bonds to the amount of $1,100,000.00. With these bonds, or the proceeds thereof in the event of sale, it proposed to acquire the canals, irrigation works and water rights of the Canyon Canal Company and make the desired improvements and extensions.

In accordance with the provisions of the Idaho Statutes and in order to enhance the market value of its bonds by removing all doubt as to their validity, the District instituted proceedings in the State courts to have it judicially determined and decreed that it had been legally organized, that the bonds had been properly authorized and would in the hands of the purchasers, be legal and valid obligations of the District. These confirmation proceedings were carried to the Supreme Court of the State, and the decision of that court, approving all the proceedings of the District relative to its organization and the issuance of its bonds, is reported under the title of Emmett Irrigation District vs. Shane, 19 Ida. 332, 113 Pac. 444.

The District offered its bonds for sale and gave public notice requesting bids, but no bids were received (Record, p. 119). Some seven months later negotiations for the purchase of the canal system were taken up with Corkill & Company, dealers in municipal bonds, of the city of Chicago, who were seemingly in a position to effect a deal through their relation with the Canyon Canal Company and its creditors and the holders of its securities. The record shows that the Canyon Canal Company had sold water rights in the irrigation system under contracts of sale on which there was payable to the Company upwards of $600,000.00 in deferred payments. These contracts were a lien upon the land of the settlers who had purchased water rights and also upon the water rights sold and the interest of the settlers in the canal system. The Canyon Canal Company had in turn issued bonds, notes and other obligations and secured the payment thereof by a Trust Deed or Mortgage on the irrigation system and water rights, and as additional security had deposited the water contracts referred to with the Trustee under such Trust Deed,—The American Trust & Savings Bank of Chicago. Some of the obligations of the Canyon Canal Company were due, and on others there was default in the payment of interest, and foreclosure of the mortgages on the irrigation system with the delay and expense incident to such litigation confronted both the Canal Company and the District.

To accomplish the immediate transfer of the irrigation system and appurtenant water rights to the

Irrigation District, free and clear of the mortgages, trust deeds, liens and encumbrances created by the Canyon Canal Company, a contract was entered into on September 12, 1911 (Record, pp. 60-77) with Corkill & Company, wherein and whereby the District agreed to pay for such irrigation system, free and clear of encumbrances, $820,000.00 in bonds at par, the remainder of the issue—$280,000.00—Corkill & Company agreed to sell at par and the proceeds of which the District proposed to use for needed improvements, enlargements and extensions of the irrigation system.

It is admitted that the District received what it bargained for, except that Corkill & Company did not sell the entire $280,000.00 of bonds, but actually sold $125,000.00 of bonds at par and turned the money over to the District. The contract with Corkill provided that $220,000.00 of the $820,000.00 of bonds to be issued for the irrigation system and water rights should be deposited with the Fort Dearborn Trust & Savings Bank of Chicago and delivered in installments as he succeeded in carrying out his part of the agreement, viz., when he had delivered title to the system free and clear of encumbrances, $150,000.00 of the $220,000.00 of bonds should be delivered; the balance should be delivered pro rata as he sold the $280,000.00 of bonds to be sold at par for improvements and extensions. Under the contract referred to the irrigation system and water rights were conveyed to the District free and clear of encumbrances, and the District has been in

the possession and had the use and enjoyment of all the property for more than six years. But instead of receiving $280,000.00 for improvements the District actually received $125,000.00 in cash for the bonds that were sold, and it has left in its treasury not $155,000.00 of bonds, but $202,400.00 of bonds, including the bonds forfeited by Corkill & Company when they were unable to carry out their contract. The District is consequently $47,400.00 better off than if Corkill & Company had fully carried out their contract.

On September 12, 1912, (Record, pp. 131-139) and again on April 5, 1913, (Record, pp. 139-148) the District and Corkill & Company entered into new contracts ratifying and affirming what had been done under the first contract and making new provisions for the sale of the remaining bonds. Under each of these contracts bonds were sold by Corkill & Company and delivered by the District. (Rec. pp. 130, 150, 156-7.) In the last contract each released the other from all claims and damages of whatsoever kind for default or failure to fully carry out the contract of September 12, 1911. (Rec. p. 146.)

The benefits received by the land owners from the acquisition of the irrigation system and the issuance of the bonds were apportioned by the District and confirmed by the Court in June, 1913, (Rec. pp. 180-181), and, based on these benefits, the District Board in October, 1913, levied a tax for the payment of interest on the bonds. But only a small part of the tax was actually collected. At the time of the

trial the Treasurer had on hand in the Interest Fund about $8,000.00 with which to pay about $55,000.00 of interest coupons maturing January 1st and July 1st, 1914. (Rec. p. 157.) In June, 1912, the people voted a special tax to pay the interest maturing July 1st, 1912, (Rec. pp. 207-8), but after authority to levy the tax had been received the District raised the money by transferring funds from another account.

The money collected under the tax levy made in 1913 has not been applied to the payment of interest, (Rec. p. 157) and the Bill alleges that it is the purpose of the District to repudiate its bonds and divert the money in the Interest Fund to other purposes; that the conduct of the District has cast a cloud upon the validity of the outstanding bonds, and it is impossible for anyone to determine what bonds the District contends are valid, if any, and what bonds are void; that because of the contention that a part of the bonds were issued without consideration or any adequate or sufficient consideration, coupled with the further statement that the District kept no record of its bond sales and does not know which of its bonds were so issued without sufficient consideration or any consideration, and that it is impossible for the District to identify the bonds that were used for the purchase of canals and irrigation works from those that were actually sold for cash, a cloud has been cast upon the validity of all the outstanding bonds, destroying their market value, and in order for the bondholders to have full and ade-

quate relief the court must ascertain and determine what bonds, if any, have been illegally issued and are void and should be cancelled and not be permitted to share in the Interest Fund on hand or in the future funds raised for the payment of interest and principal on the legally issued bonds of the District, and until the validity of all the bonds has been ascertained the District refuses to levy the necessary interest tax.

The case first came before this Court in 1915 on the appeal of the bondholders from an order dismissing the Bill and sustaining a motion of the District that the Bill did not state a case for equitable relief. The decision on that appeal (Thompson vs. Emmett Irrigation District, 227 Fed. 560, 142 C. C. A. 192) disposes of most, if not all, of the questions raised on this appeal. This court held that it was a class suit, that the Bondholders were entitled to the relief demanded, if the facts were as alleged in the Bill, and that it was a suit that came clearly within the jurisdiction of a court of equity. The case was sent back for trial, and upon the trial of the case the facts were established substantially as alleged in the Bill and the trial court found in favor of the appellees on every issue and granted relief in accordance with the views expressed by this court in its decision on the former appeal. (See decision of Trial Court, Record, pp. 95-114.)

From that decision appellants have appealed, raising again many of the questions that were decided adversely to them on the former appeal.

BRIEF OF THE ARGUMENT.

The Former Decision Is the Law of the Case.

None of the questions which were before this court on the first appeal can be reheard or examined upon the second appeal. The former decision is now the *law of the case.*

Roberts vs. Cooper, 20 How. 467, 15 L. Ed. 969.

Sizer vs. Many, 16 How. 98, 14 L. Ed. 862.

Empire State-Idaho Min. & Dev. Co. v. Hanley, 136 Fed. 99, 69 C. C. A. 87.

Montana Min. Co. v. St. Louis, etc. Co., 147 Fed. 897, 78 C. C. A. 33.

It Is a Class Suit.

Where the parties interested in the suit are numerous their rights and liabilities are so subject to change and fluctuation by death, or otherwise, that a court of equity for convenience and to prevent a failure of justice will permit a portion of the parties in interest to represent the entire body, and the decree binds all the parties to the same extent as if they were all before the court.

Smith vs. Swormstedt, 16 How. 288, 14 L. Ed. 942.

Hartford Life Ins. Co. vs. Ibs, 237 U. S. 672, 59 L. Ed. 1169.

Wallace vs. Adams, 204 U. S. 425, 51 L. Ed. 552.

Beatty v. Kurtz, 2 Pet. 556, 7 L. Ed. 521.

United States v. Old Settlers, 148 U. S. 227, 37 L. Ed. 509.

Hotel Co. v. Wade, 97 U. S. 13, 24 L. Ed. 917.
Galveston R. R. Co. v. Cowdrey, 11 Wall. 459, 20 L. Ed. 199.
Wabash & Erie Canal Co. v. Beers, 2 Black 448, 17 L. Ed. 227.
Johnson v. Watters, 111 U. S. 640, 28 L. Ed. 547.
Harmon v. Auditor of Public Accounts, 123 Ill. 122, 5 Am. St. Rep. 502.
Watson v. National Life & Trust Co., 162 Fed. 7, 88 C. C. A. 380.
Merchants & Manufacturers Traffic Assn. vs. United States, 231 Fed. 292.
Simpkins, Fed. Eq. Suit, (3d Ed.) p. 238.
Street, Fed. Eq. Pr., Vol. 1, Secs. 539-553.
Equity Rule No. 38.

The Idaho Irrigation District Law Must Be Liberally Construed.

The statutes of Idaho expressly require that courts in construing the irrigation district law "shall disregard every error, irregularity or omission which does not affect the substantial rights of any party."

Sec. 2403, Idaho Revised Codes.
Emmett Irrigation Dist. v. Shane, 19 Ida. 332, 113 Pac. 444.
Nampa & Mer. Irri. Dist. vs. Brose, 11 Ida. 474, 83 Pac. 499.

The Laws of Idaho Contemplate That Irrigation District Bonds Shall Not Be Subject to Attack In the Hands of the Public.

The Legislature, in providing for the confirmation by the courts of the proceedings of an irrigation

district relative to its organization and the issuance of bonds, intended that all questions with reference to the validity of its bonds should be determined before they were actually issued, so as to remove all doubt as to their validity and thereby enhance their market value.

Nampa & Mer. Irr. Dist. v. Brose, 11 Ida. 474, 485.

Progressive Irr. Dist. v. Anderson, 19 Ida. 504, 512, 114 Pac. 16, 18.

In the State of Idaho the rule of estoppel is rigidly enforced in favor of holders of bonds of irrigation districts, where the district has received and retains the benefits for which it bargained, and the bonds will not be annulled or declared void because of irregularities in the manner of disposing of the bonds by the District or in the clerical work of issuing the same.

Page v. Oneida Irr. Dist., 26 Ida. 108, 141 Pac. 238.

Date of Issue Fixed by Statute.

The Idaho law arbitrarily fixes the date of the bonds and coupons and provides that "the portion of the bonds of a series sold at any time shall be designated as an *issue*, and each issue shall be numbered in its order," and that they shall mature serially after the eleventh year; and in this case the bonds were properly dated January 1, 1911, and their maturities are properly fixed with reference to that date.

Idaho Revised Codes, Sec. 2397.
Yesler vs. City of Seattle, 1 Wash. 308, 25 Pac. 1014.
O'Neill vs. Yellowstone Irr. Dist., 44 Mont. 292, 121 Pac. 283.
Page vs. Oneida Irrigation District, *supra.*

The Idaho Statutes, unlike the California Statutes, specifically provide that the bonds must be dated on January first or July first following the date of their authorization by the voters of the District; and the word "issue" as used in Section 2397 of the Idaho Revised Codes is used as a substantive or noun and means the block of bonds which the district has determined to offer for sale at one time, and its meaning in the Idaho Statutes is widely different from that of the verb "issue" used in the California Statutes, which refers to the actual sale and delivery of the bonds by the district.

Section 2397, Idaho Revised Codes.

The Board of Directors Has Broad Powers in the Purchase of Property.

Irrigation Districts are expressly authorized to acquire, by purchase or other legal means, "all lands and water rights, and other property necessary for the construction, use and supply, maintenance, repair and improvement" of the necessary canals and irrigation works, "including canals and works constructed and being constructed by private owners, lands for reservoirs for the storage of needful wa-

ters, and all necessary appurtenances." And "in case of purchase, bonds of the district * * * may be used to their par value in payment."

Idaho Revised Codes, Sections 2386, 2422.

Section 2386, Idaho Revised Codes, expressly provides that "said board (directors) shall have the power to manage and conduct the business and affairs of the district." And Section 2422 expressly provides that "said irrigation districts shall have the right by and through their boards of directors to acquire by purchase or other legal means, any or all of the property mentioned and referred to in this section."

The board of directors of an irrigation district is clothed by the statute with a wide discretion as to the manner in which the business of the district shall be managed and water acquired for the reclamation of the lands in the district, and the courts will not be warranted in interfering with that discretion on any mere question of good business policy. Nothing short of a gross abuse of power will warrant such interference.

Hanson vs. Kittitas Reclamation Dist., 75 Wash. 342, 134 Pac. 1083.

Contracts Should be Given the Construction That Will Render Them Valid.

Where the directors have acted within the scope of their authority and purchased property and obtained the cancellation and surrender of liens and encumbrances against the same, using their own

bonds at par in paying for such property, and are retaining, using and enjoying the benefits from such property and not offering to restore it, and it being impossible to put the former mortgagees and lien holders in *statu quo*, or restore them to any of their previous rights, courts will not be astute to find some pretext or technicality for invalidating the bonds of the district. In such cases the contract, if susceptible of two constructions, will be given the construction which renders the transaction legal and valid.

The fact that the present Board of Directors may believe that its predecessors made an unwise bargain does not invalidate the transaction or render the bonds of the district subject to attack, either in the hands of innocent holders for value or in the hands of those who purchased with entire knowledge of the transaction, which in itself was free from fraud and unfair dealing and well within the power of the Board of Directors of irrigation districts under the Idaho Statutes.

The District only agreed to purchase the irrigation system and water rights of the Canyon Canal Company free and clear of the then outstanding mortgages, liens and encumbrances of that company, and the fact that the Canal Company, before it could close the transaction and comply with the contract, submitted to its own bondholders and creditors a proposition to pay its own obligations in District bonds at par in no sense constitutes an exchange by the District of its bonds for Canal Company bonds. (See Rec. p. 152.)

Kinkade vs. Witherop, 29 Wash. 10, 69 Pac. 399.

Page vs. Oneida Irr. Dist., 26 Ida. 108, 141 Pac. 238.

Washington - Oreg. Corp. vs. Chehalis (Wash.), 136 Pac. 681.

The Bonds Need Not be Signed by the Officers in Office When Bonds are Delivered

The Idaho statutes do not require that irrigation district bonds must be signed by the officers in office at the time the bonds are actually delivered to the purchaser. It is sufficient that they are signed by the officers in office at the time of their date, and who held such office at the time they actually signed the bonds and when the contract for sale was made.

Page vs. Oneida Irr. Dist., 26 Ida. 108, 141 Pac. 238.

Town of Weyauwega vs. Ayling, 99 U. S. 112, 25 L. Ed. 470.

O'Neill vs. Yellowstone Irr. Dist., 44 Mont. 292, 121 Pac. 283.

The Later Officers Ratified the Action of Their Predecessors in Executing the Bonds.

The delivery of the bonds by the new officers and the subsequent contracts that were entered into for their sale by the new officers, and under which many of the bonds were sold, constitute a ratification of their execution by the former officers, and the later officers are estopped from questioning their execution.

Cases cited *supra.*

The Statute Requiring a Record to be Kept of Bond Sales is Directory.

The provisions of the statutes that "the secretary and treasurer shall each cause a record of the bonds sold, their number, the date of sale, the price received and the name of the purchaser" are directory and the failure of such officers to keep the record required does not affect the validity of the bonds.

Rondot vs. Rogers Township, 99 Fed. 202, 39 C. C. A. 462.

Bank vs. Dandridge, 12 Wheat. 64, 6 L. Ed. 552.

1 Dillon, Municipal Corporations, Sec. 300.

Rock Creek vs. Strong, 96 U. S. 271, 24 L. Ed. 815.

Abbott on Public Securities, p. 736.

Board of Commissioners vs. Vandriss, 115 Fed. 866, 53 C. C. A. 192.

Singer Mfg. Co. v. Elizabeth, 42 N. J. L. 249.

S. St. Paul vs. Lamprecht Bros. Co., 88 Fed. 449, 31 C. C. A. 585.

Dows vs. Town of Elmwood, 34 Fed. 114.

Lyons vs. Lyons Nat. Bank, 4 Fed. 369.

The Officers are the Agents of the Municipality.

Public officials are the agents of the municipality and not of the purchasers of its securities, and if there has been misconduct on the part of the officials the municipality, rather than a stranger, must bear the consequences.

Town of East Lincoln vs. Davenport, 94 U. S. 801, 24 L. Ed. 322.

Warren vs. Marcy, 97 U. S. 96, 24 L. Ed. 977.
Daviess vs. Huidekoper, 98 U. S. 98, 25 L. Ed. 112.
Hackett vs. Ottawa, 99 U. S. 86, 25 L. Ed. 363.

The Bondholders are Entitled to the Benefit of the Presumptions That Attach to Commercial Paper.

The Idaho statutes expressly require that irrigation district bonds shall be negotiable in form, and the provisions of the statutes for obtaining the judgment of the Supreme Court of the State as to their legality before they are sold to the public show clearly the intention to invest such bonds with all the privileges and immunities that the law accords to commercial paper.

The holder of commercial paper, in the absence of proof to the contrary, *is presumed to have taken it underdue, for a valuable consideration and without notice of any objection to which it was liable.*

San Antonio vs. Mehaffy, 96 U. S. 312, 24 L. Ed. 816.
Lampasas v. Talcott, 36 C. C. A. 318, 94 Fed. 457.
Pickens Twp. v. Post, 41 C. C. A. 1, 99 Fed. 659.
First National Bank v. Moore, 78 C. C. A. 581, 148 Fed. 953.
Swift v. Tyson, 16 Peters 1, 10 L. Ed. 865.
Idaho Rev. Codes, Sec. 3516.

Possession, even without explanation, is *prima facie* evidence that the holder is the proper owner or lawful possessor of the instrument; and the settled rule is, that nothing short of fraud—not even gross negligence—is sufficient to overcome the presumption and invalidate the title of the holder as inferred from his actual custody of the instrument.

Commrs. Marion Co. vs. Clark, 94 U. S. 278, 24 L. Ed. 59.

Before proof impeaching *bona fides* can be introduced it must first be shown that plaintiff had knowledge of the facts.

Pickens Twp. vs. Post, 99 Fed. 659, 41 C. C. A. 1.

In the Federal courts it may now be considered as the settled rule that a person who takes negotiable paper before maturity for value is entitled to recover as against the maker, unless it is shown that, in the transaction by which title was acquired, the endorsee had knowledge of facts which would render the same invalid as against the maker, or was guilty of bad faith, and the burden of proving such knowledge or bad faith lies on the defendant.

First Nat. Bank vs. Moore (9th C. C. A.) 148 Fed. 953, 78 C. C. A. 581.

Young vs. Lowry, (3d C. C. A.) 192 Fed. 825, 113 C. C. A. 149.

"In an action by an endorsee upon a negotiable instrument vitiated by fraud in its inception or issued without consideration, the plain-

tiff, to prevail, must prove affirmatively that he paid value. That fact being established, he will be entitled to recover unless it is proved that he purchased with actual knowledge of the defective title, or in bad faith, implying guilty knowledge, or wilful ignorance. Circumstances which presumably would put a prudent buyer on inquiry are not enough, but to defeat an action by an endorsee of negotiable paper who obtained it in due course of business, before its maturity, and paid value for it, actual knowledge of facts sufficient to constitute a valid defense, if the action were prosecuted by the *mala fide* indorser, must be proved affirmatively."

Amalgamated Sugar Co. v. U. S. Nat. Bank, (9th C. C. A.) 187 Fed. 746, 109 C. C. A. 494.

"The possession of such paper carries the title with it to the holder: 'The possession and title are one and inseparable.' The party who takes it before due for a valuable consideration, without knowledge of any defect of title and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or the knowledge of a circumstance which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in

possession. Such is the settled law of this court, and we feel no disposition to depart from it."

Murray vs. Lardner, 2 Wall. 110, 17 L. Ed. 857.

Winter vs. Nobs, 19 Ida. 18, 112 Pac. 525.

Vaughn vs. Johnson, 20 Ida. 669, 119 Pac. 879, 37 L. R. A. (N. S.) 816.

Bison State Bank vs. Billington, 228 Fed. 116.

Idaho Rev. Codes, Secs. 3512, 3513, 3516.

Negotiable Instruments Law, Secs. 55, 56, 59.

The State of Idaho has adopted the uniform negotiable instruments law, and the bonds in question and the holders thereof are entitled to the advantages and immunities given to commercial paper and the holders thereof by that law.

Idaho Rev. Codes, Secs. 3458 to 3653, inclusive.

Under the negotiable instruments law, as adopted by the State of Idaho prior to the authorization of the bonds in question, "every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration," and "Value is any consideration sufficient to support a simple contract;" and "Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time." And "Absence or failure of consideration is a matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense *pro tanto* whether the failure is an ascertained and liquidated amount or otherwise."

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had *actual knowledge of the infirmity or defect*, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

Idaho Rev. Codes, Sec. 3513.

The District is Estopped by its Conduct and the Recitals in the Bonds.

The doctrine of equitable estoppel is freely applied in the enforcement of public obligations. It is denied only in cases where non-existence of the power to issue is shown; and a municipality will not be permitted to retain the benefits of the bargain and repudiate its obligations on the ground of unimportant irregularities in the form of its proceedings.

Abbott on Public Securities, Secs. 318-320.
Harris on Law of Municipal Bonds, p. 166.
Marshall County vs. Schenck, 5 Wall. 772, 18 L. Ed. 556.

The bonds recite that they have been issued under the Act relating to irrigation districts, and that all things required by law "precedent to and in the issue and delivery of this bond have been done, have happened and have been performed." Such recitals will not be lightly set aside.

"The provision in the statute, that the bonds shall express on their face that they were issued by authority of the act, stating its title and date of approval, was evidently for the purpose of

giving them greater negotiability. A recital as directed by the statute, that the bond was issued by the authority of the statute, and also pursuant to the provisions thereof, and in accordance with the vote of the qualified electors, was a statement upon which a purchaser would have the right to rely, and to assume therefrom that all prior acts necessary to be done to give the bond validity had been done, because otherwise the bond would not be issued under the authority and pursuant to the provisions of an act which provided for certain things to be done when they were not done in the particular case in hand. * * * Whether the various steps were taken which in this particular case justified the issue of the bonds was a question of fact; and when the bonds on their face recite that those steps have been taken it is the settled rule of this court that, in an action brought by a *bona fide* holder, the municipality is estopped from showing the contrary."

Tulare Irr. Dist. vs. Shepard, 185 U. S. 1. 46 L. Ed. 773.

Shelton vs. Gas Securities Co. (8th C. C. A.) 239 Fed. 653, 152 C. C. A. 487.

Waite vs. Santa Cruz, 184 U. S. 302, 46 L. Ed. 552.

Stanley County vs. Coler, 190 U. S. 437, 47 L. Ed. 1126.

Evansville vs. Dennett, 161 U. S. 434, 40 L. Ed. 760.

Quinlan vs. Greene County, 205 U. S. 410, 51 L. Ed. 860.

Presidio vs. Noel-Young Bond & Stock Co., 212 U. S. 58, 53 L. Ed. 402.

Provident Life & Trust Co. vs. Mercer County, 170 U. S. 593, 42 L. Ed. 1156.

Andes vs. Eli, 158 U. S. 312, 39 L. Ed. 996.

Town of Newbern vs. National Bank of Barnesville, 234 Fed. 209, 148 C. C. A. 111.

Town of Aurora vs. Gates (8th C. C. A.) 208 Fed. 101, 125 C. C. A. 316.

Hughes County vs. Livingston (8th C. C. A.) 104 Fed. 306, 43 C. C. A. 541.

Fairfield vs. Royal Ind. School Dist., (8th C. C. A.) 116 Fed. 838, 54 C. C. A. 342, 187 U. S. 643.

ARGUMENT.

The decision of this Court on the first appeal in this case (227 Fed. 560, 142 C. C. A. 192) is the law of the case and is sufficient answer to most of the assignments of error urged by appellants. This Court held that appellees (plaintiffs below) were entitled to equitable relief as prayed for, if the facts were as alleged in the Bill. The trial court has now found the facts as alleged, and it is conceded by appellants that the facts are not in dispute. The decision of the trial court is also sustained by the decision of the Idaho Supreme Court in the case of Page vs. Oneida Irrigation District, 26 Ida. 108, 141 Pac. 238, a case covering all the questions raised by appellants about

the issuance, signature and sale of the bonds, and many others far more important than any that have been urged in this case.

When the decisions referred to above are examined and the recitals in the bonds are considered the decision of the trial court must be affirmed. We shall consider first the question of parties.

Parties.

This question, we submit, was entirely disposed of by the former appeal where that question was fully considered. At that time only one bondholder was plaintiff. Since then ten other bondholders have been permitted to intervene and join the original plaintiff in the prosecution of the suit. The case is clearly the kind of case that Equity Rule No. 38 was intended to cover. The record shows (Record, p. 182) that there are between 250 and 300 bondholders widely scattered, holding in the aggregate $897,600.00 of bonds, and that until the validity of all the bonds are established the *pro rata* or proportionate share of each bondholder in the Interest Fund on hand cannot be determined, as the fund is insufficient to pay all the interest coupons in full; and the cloud which now hangs over all the bonds, destroying their market value and rendering it impossible to say which bonds are valid and which are invalid, cannot be removed except by a decree such as was entered in this case.

It is manifestly impossible to bring all the bondholders into court. To apply such a rule would be to

deny the bondholders any relief and permit the District to entirely escape the payment of its just obligations.

Counsel for appellants has erroneously assumed throughout his brief that only the plaintiffs who are actual parties to the suit are bound by the decree and that it does not bind the *quasi* parties or other members of the class. Such is not the law.

Probably the leading case of a true class suit is Smith vs. Swormstedt, 16 How. 288, 14 L. Ed. 942. The Methodist Episcopal Church had been divided into two branches and the action was brought by certain persons as plaintiffs in behalf of themselves and many others of the southern branch of the Church to establish their right to an interest in a trust fund for the benefit of superannuated preachers. A few defendants were named as representatives of the members of the other branch. The bill was objected to for want of proper parties, and in overruling the objection, the Supreme Court said:

> "Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. *For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were*

before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.

"The case in hand illustrates the propriety and fitness of the rule. There are some fifteen hundred persons represented by the complainants, and over double that number by the defendants. It is manifest that to require all the parties to be brought upon the record, as is required in a suit at law, would amount to a denial of justice. The right might be defeated by objections to parties, from the difficulty of ascertaining them; or if ascertained, from the changes constantly occurring by death or otherwise." (Our italics.)

See also:

Hartford Ins. Co. vs. Ibs, 237 U. S. 672; 59 L. Ed. 1169.

Beatty vs. Kurtz, 2 Pet. 566, 7 L. Ed. 521.

U. S. vs. Old Settlers, 148 U. S. 227, 37 L. Ed. 509.

Mason vs. York etc. R. R. Co., 52 Me. 109.

Another case illustrating clearly the application of this rule is that of Galveston R. R. Co. v. Cowdrey, 11 Wall. 459, 483, 20 L. Ed. 199, 205. The action was brought by certain bondholders in behalf of themselves and all other bondholders for foreclos-

ure of all the bonds under three successive mortgages creating liens of different priorities, and involving the question as to whether the bondholders were in fact holders in due course. The observations of the court in that case are particularly pertinent here, and we quote at some length from the decision:

> "But it is objected that the complainants are not *bona fide* holders of the bonds in their possession; that many of the bonds were issued improvidently, and against stipulations contained in the mortgages, to the effect that they should only be issued to retire the previous issue of bonds. If this were true with regard to some of the bonds, it is not pretended to be true with regard to all of them; and the question: what particular bonds were wrongfully issued, if a material question, is properly examinable in the master's office, where all bonds are to be presented and passed upon, if not already done. And the decree will stand only for the benefit of such bonds as appear to be entitled to its benefit; and this benefit will not be confined to the complainants' bonds, but will be extended to all bonds that may be presented by other holders. But it does not appear, so far as we have been able to scrutinize the evidence that the complainants are not *bona fide* holders of their bonds. They have been examined, and have produced their bonds, and have told how they procured them, (namely: by purchase), and

what they gave for them; and they allege that they purchased them in good faith in the open market, supposing them to be valid obligations of the Company, and being told that they were. If such is the fact, and no proof to the contrary occurs to us, we do not see why the complainants must not be held to be *bona fide* holders for value of the said bonds.

"The next objection we shall notice is, that the complainants have no right to sue for themselves and in behalf of the several classes of bondholders under the different mortgages, because the interests of these classes are antagonistic to each other. They are no more antagonistic to each other than the several bondholders of the same class are. It is the interest of each bondholder to have as few prior claims to his, and as few participants with him as possible. Every co-bondholder is, in one sense, an antagonist. But the objection is entirely without foundation. The complainants do, in fact, hold bonds of the three different classes, and they have a perfect right to state that fact in their bill, and to pray relief suitable to the fact, and no possible harm or inconvenience can arise in their suing in behalf of themselves and all other bondholders in each class according to their several priorities. If any class of bondholders wish to contest the precedency of a prior mortgage, they have a perfect right to intervene in the suit and file a cross-bill setting up the

matter of objection. All bondholders, including the complainants themselves, have to establish their claims in the case before it is finally closed, and before a distribution of the assets can be made. Any bondholder proving his claim may contest the claim of any other bondholder. It has even been held that a mortgagee may sue on behalf of himself and all other creditors, notwithstanding he claims a right to prior satisfaction out of the mortgaged property. See Story Eq. Pl., Secs. 101, 158. And Judge Story says that, on principle, it is not easy to see why it might not be sufficient, in a suit by incumbrancers, to file the bill on behalf of all the creditors and incumbrancers; thus making them all, in a sense, parties to the extent of asserting their own rights, or of enabling them to contest the matter before a master. He says that this seems to be the true doctrine inculcated by the more recent authorities. Story Eq. Pl. 158; Eq. Jur., Sec. 549. But the case before us is much stronger than this. The complainants must set out their own claims under the different mortgages, and it would be impossible to make all the bondholders of either class parties, for they could not be discovered; and the rights of all are protected by the opportunity given to all to contest the claim of any. We consider the bill as properly conceived, and the objection as untenable."

In Harmon vs. Auditor of Public Accounts, 123 Ill. 122, 5 Am. St. Rep. 502, 506, certain taxpayers and property owners had filed a bill in equity as a class suit to enjoin the collection of taxes for the payment of bonds issued by the town of Mount Morris. A later action was begun for the same purpose by other taxpayers not actual parties on the record in the former suit, and the court held that the taxpayers bringing the second suit were members of the class and were bound by an adverse decree in the first suit. The court said:

> "The present suit was begun by Harmon and others, also taxpayers and property owners of the town, as representatives of the same class, for whose benefit the Pinckney bill was filed. The complainants in this proceeding were represented by the complainants in the former suit, and are therefore bound by the decree therein entered. The remedy in suits of the character here indicated is in the interest of a class of individuals having common rights that need protection, and in the pursuit of that remedy individuals have the right to represent the class to which they belong. This jurisdiction, in some respects, rests on the principles of a proceeding *in rem.*
>
> "We therefore think that there is sufficient identity between the parties filing the present bill and those who filed the bill in the Pinckney case to justify the pleading of the decree entered there as *res judicata* in this case. The views

here expressed are sustained by the following authorities: State v. C. & L. R. R. Co., 13 S. C. 290; Terry v. Town of Waterbury, 35 Conn. 526; Sabin v. Sherman, 28 Kan. 289; Smith v. Swormstedt, 16 How. 303."

Additional authorities are cited in support of this point in the Brief of the Argument, and we deem it unnecessary to further extend the discussion here. But these questions would seem to be *res judicata*, or in any event finally determined by the decision of this court on the first appeal. Every point made as to parties or the sufficiency of the Bill or the form of the bonds was concluded by that decision.

"It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort of the same questions which were open to dispute on the first, would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members,"

said the Supreme Court of the United States in Roberts vs. Cooper, 20 How. 467, 15 L. Ed. 969.

The Bondholders' Committee for obvious reasons elected to confine its support or relation to the suit, to the payment of the expenses, and insisted that the individual bondholders should be responsible for their own proof and for that reason the suit was carried on in the name of the bondholders themselves, as was expressly authorized in the bondholders' agreement (Rec. p. 185). Had the Committee been the actual plaintiff, it would have been under the same handicaps and embarrassments as the bondholders under a rule requiring all the bondholders to join in the suit; besides the Committee is representing a body constantly changing as the certificates of deposit or bonds are sold or transferred either by operation of law or voluntary transfers.

Date of Issue

Counsel for appellants concede that the Idaho statutes are so radically different from the California statutes and the original Wright Act that the decisions of the California courts and in Wright vs. East Riverside Irrigation District (9th C. C. A.) 138 Fed. 313, are not in point (p. 34, Appellants' Brief).

The California statutes before this court in Wright vs. East Riverside Irrigation District *supra*, and before the Supreme Court of California in the many cases that have come before that court involving irrigation district bonds, did not fix the date of the bonds as of January first or July first following the date of their authorization, as does the Idaho

law. Neither did it provide for "series" or "issues," but it provided that "they (the bonds) shall be numbered consecutively *as issued*, and *bear date at the time of their issue*," which clearly contemplated, as held by the courts, that the bonds should be dated at the time they are issued or delivered to the purchaser, and should bear interest from the time of sale and mature with reference to that date. But the Idaho law was drawn upon an entirely different theory. It fixes an arbitrary date for the bonds and it contemplates that they shall bear interest and mature with reference to that date so as to give order, system and uniformity to the financial affairs of irrigation districts and harmonize the date of payment of bonds and interest with the date for the payment of taxes.

Section 2397 of the Idaho Revised Codes, insofar as it has any bearing upon the question involved, reads as follows:

> "The bonds authorized by any vote shall be designated as a series and the series shall be numbered consecutively as authorized. The portion of the bonds of a series sold at any time shall be designated as an issue, and each issue shall be numbered in its order. The bonds of each issue shall be numbered consecutively, commencing with those earliest falling due, and they shall be designated as eleven year bonds, twelve year bonds, etc. They shall be negotiable in form and payable in money of the United States as follows, to-wit: At the expira-

tion of eleven years from each issue, five per cent of the whole number of bonds of such issue; at the expiration of twelve years, six per cent; at the expiration of thirteen years, seven per cent; at the expiration of fourteen years, eight per cent; at the expiration of fifteen years, nine per cent; at the expiration of sixteen years, ten per cent; at the expiration of seventeen years, eleven per cent; at the expiration of eighteen years, thirteen per cent; at the expiration of nineteen years, fifteen per cent; at the expiration of twenty years, sixteen per cent: Provided, That such percentages may be changed sufficiently so that every bond shall be in amount of one hundred dollars or a multiple thereof, and the above provisions shall not be construed to require any single bond to fall due in partial payments. Interest coupons shall be attached thereto, and all bonds and coupons shall be dated on January first or July first next following the date of their authorization and they shall bear interest at a rate of not to exceed seven per cent per annum, payable semi-annually on the first day of January and July of each year. The principal and interest shall be payable at the place designated therein. Said bonds shall be each of the denomination of not less than one hundred dollars nor more than one thousand dollars, and shall be signed by the president and secretary, and the seal of the board of directors shall be

affixed thereto. Coupons attached to each bond shall be signed by the secretary. Said bonds shall express on their face that they were issued by the authority of this title, naming it, and shall also state the number of the issue of which such bonds are a part. The secretary and treasurer shall each keep a record of the bonds sold, their number, the date of sale, the price received, and the name of the purchaser. In case the money raised by the sale of all the bonds be insufficient for the completion of the plans and works adopted, and additional bonds be not voted, it shall be the duty of the board of directors to provide for the completion of said plan by levy of assessment therefor, in the manner hereinafter provided."

In the case at bar, the Emmett District proposed to sell all its bonds at one time, and it therefore designated them as "first issue." That the legislature contemplated that bonds would be dated sometime prior to their sale, or before they were actually "issued," is apparent from other provisions of the statutes providing that the district cannot sell the bonds at less than par "*and accrued interest.*"

Section 2404, Revised Codes, provides that:

"Before making any sale the board shall, by resolution, declare its intention to sell a specified amount of the bonds, and if said bonds can then be sold at their face value and *accrued interest*, they may be sold without advertisement."

And if no bids are received after notice has been properly given, the statute further provides that "said board shall in no event sell any of the said bonds for less than the par or face value thereof and *accrued interest.*"

The trial court was clearly right in its construction of the Idaho statutes, and it is in entire accord with not only the decisions of the Supreme Court of the State on the subject but with the uniform practice under the law and the construction that has been placed upon it by the Bench and the Bar of the State since the statute was first enacted. The term "issue" as used in the Idaho statutes has clearly reference to the block of bonds which the district resolves to sell at one time, and is used as a substantive and not as a verb, as is the case in the California statutes; and there is nothing on the face of the bonds and coupons in this case to put a purchaser on notice of irregularities in the issuance of securities, as was the case in Wright vs. East Riverside Irrigation District, *supra.*

In the case of Page vs. Oneida Irrigation District, 26 Ida. 108, 141 Pac. 238, the bonds were likewise designated as "First issue—first series." They were dated January 1st, 1903, and bore interest from date. They were actually sold and delivered to the purchasers from time to time during 1904 and 1905, the last sale being nearly three years after the date of the bonds. They matured with reference to their date as provided by the Idaho statutes, and as do the bonds now before the Court. They were all held

valid by the Supreme Court of the State. See, also,

O'Neill vs. Yellowstone Irr. Dist., (Mont.) 121 Pac. 283.

Yesler vs. City of Seattle (Wash.) 25 Pac. 1014.

Execution of Bonds by Officers of District

The bonds bear date January 1st, 1911. At that time Harry S. Worthman was Secretary of the District and W. E. Bell was President. They continued as such throughout the year 1911 (Record p. 118), and they signed the bonds in the month of December, 1911, (Record, p. 120). The attempt of appellants to show, *although not an issue under the pleadings* (Rec. p. 51), that any of the outstanding bonds were signed after Bell went out of office failed completely. The most that can be said for their proof on that point is that Mr. Bell commenced to sign the bonds about the middle of December and he continued to sign until about the 2nd of January. He may have signed a few after that date, but there is no attempt to identify the bonds that he may have signed after that date; and as there are over $200,000.00 of bonds still in the hands of the District there can be no presumption that he signed any of the outstanding bonds after his term expired.

Mr. Bell's successor as Director—W. H. Shane—sat in the meetings of the Board commencing on December 22, 1911, but his bond as a Director was not sent to the Probate Judge for approval until after the meeting of January 2nd, 1912, and there is no evidence when it was approved.

Section 2378 of the Idaho Revised Codes provides that:

> "An election shall be held in each district on the second Tuesday in December of each year thereafter (following the organization of the district), at which one director shall be elected for a term of three years, *or until his successor is elected and qualified.* Such director must be a qualified elector and a resident of the division of the director whom he is to succeed in office. Within ten days after receiving the certificates of election hereinafter provided for, said officer shall take and subscribe the official oath, and file the same in the office of the board of directors, and execute the bond hereinafter provided for. Each member of said board of directors shall execute an official bond in the sum of five thousand dollars, which said bonds shall be approved by the judge of the probate court of said county where such organization was effected, and shall be recorded in the office of the county recorder thereof and filed with the secretary of the board. All official bonds provided for in this title shall be in the form prescribed by law for the official bond of county officers."

There is no evidence in the record as to when, if at all, Mr. Shane received his certificate of election or took the oath of office, or when his bond was approved by the probate judge.

Mr. Craig, a witness for appellants, testified (Record p. 197):

> "I had these bonds in my possession in the bank both before and after they were signed by the officers. They were signed by Mr. Bell as President, between the 15th of December and sometime after the first of January, 1912. Two or three days afterwards I think. I don't know how many were signed after the first of January. All were signed in our bank room. They had been signed by the Secretary before the President signed them."

Mr. Shane testified for appellants as follows (Record, p. 198):

> "Mr. Bell finished signing the bonds as President on the 3rd or 4th of January."

There is not only no evidence as to when Mr. Shane actually qualified as Director, but there is also no evidence when any one was elected President of the Board of Directors to succeed Mr. Bell. The record shows that a special meeting of the Board was held on December 22, 1911, when Mr. Bell was not present, and it was "Moved and seconded that R. B. Wilson act as temporary President" (Record, p. 195). At this time Mr. Bell was actually engaged in signing the bonds as President of the District, and it was clearly the purpose of the Board to have the signing of the bonds completed before there was any reorganization or election of new officers.

In addition to appellants' failure to sustain the burden of proving that any of the outstanding bonds were signed by persons who were not officers of the District, the record shows a complete ratification by

the new officers of the execution of these bonds. They sent the entire issue when executed to the Fort Dearborn Trust & Savings Bank; $800,000.00 of them were received by the bank immediately prior to January 5, 1912, and the balance the latter part of February (Record, p. 127). The District carried out, so far as within their power, the contract of September 12, 1911, and obtained waivers from the land owners of all objections to the validity of the bonds and to the carrying out of the contract (Record, p. 207). They made additional contracts with Corkill & Company for the sale of these bonds after the expiration of the first contract (Record, pp. 131, 139-148). They called a special election of the voters of the District for voting a special tax to pay the July 1st, 1912, interest on these bonds, and the election carried by a vote of 107 in favor of such special assessment to 42 against (Record, pp. 207-208). They apportioned the benefits that would result to the lands from the purchase of the irrigation system and the issuance of the bonds, and it was found and determined by the Board in the spring of 1913, when the apportionment was made, that the aggregate of the benefits to the land owners was $1,100,000.00, and this apportionment of benefits was confirmed by the Court and long since became final and binding on the land owners and the District (Record, pp. 180-181.) They levied the interest tax in the fall of 1913. The ratification of the bonds is complete and we have further the solemn recital in the bonds themselves that every act has been done and performed as re-

quired; surely the record sustains the decision of the trial court on this point. Besides appellants claimed in their answer (Rec., p. 51) that the bonds only lacked the signature of the officers in office at the time they were *delivered*, and there was no issue about the bonds not having been signed by the officers in office when the bonds were signed.

O'Neill vs. Yellowstone Irr. Dist., (Mont.) 121 Pac. 283.

Weyauwega vs. Ayling, 99 U. S. 112, 25 L. Ed. 470.

Maturity of Bonds.

Appellants attempt to take advantage of a slight ambiguity in the bonds with reference to the maturities. The bonds expressly state that $110,000.00 in amount mature on January 1st, 1927, which is ten per cent. of the issue and the amount the statute requires should mature at that time. They likewise expressly state that $176,000.00 in amount mature on January 1, 1931, which is the amount that should mature on that date. But following these expressions is a description of the bonds which it is said does not correspond with the amount which the bonds state will mature on those dates, but there is no evidence that the description of the bonds is correct and that the figures $110,000 and $176,000 are wrong. The only evidence on the point is given by the witness Craig for the appellants, who testifies (Rec. p. 196):

"I have not examined the bonds themselves to determine whether $110,000.00 are made to

mature in the sixteenth year or only $100,000.00, nor whether $186,000.00 of them mature in the twentieth year or only $176,000.00. So I do not know how many bonds actually mature in the sixteenth year or in the twentieth year."

The District contends that only $100,000.00 mature the sixteenth year, when it should be $110,000.00, and that $186,000.00 mature the last year when it should be $176,000.00. But, as stated above, there is no evidence except the ambiguity mentioned supporting the contention of the District, besides the total indebtedness is not changed in the slightest; there is at most but a change of $10,000.00 from the sixteenth to the twentieth year. But as the District has over $200,000.00 of bonds on hand *unissucd*, the discrepancy in the maturities can be readily adjusted in the issuance of the remaining bonds. The trial court was clearly right in adopting the construction that would make the bonds valid instead of the one that would render them void.

Record to be Kept by Secretary and Treasurer.

The provision in Section 2397 of the Revised Codes that "The secretary and treasurer shall each keep such a record of the bonds sold, their number, the date of sale, the price received and the name of the purchaser" is obviously directory. It is a record that can only be made up after the bonds have been sold and delivered. There is not the slightest authority for appellants' contention that the neglect of the officers to perform their duties will render the bonds

void and permit the District to retain the consideration which it received.

The officers of the District certify in the bonds themselves that all the requirements of the statutes have been complied with, and the District will not after it has received the consideration be permitted to say that the certificate in the bonds is false. The district officers, however, had all the information from which to make the record. The contract with Corkill & Company was a sale of the bonds to them to the extent of the amount of bonds taken from escrow. The law never contemplated that where the bonds were sold to a bond house or to a dealer in municipal bonds the secretary and treasurer should follow up the transaction and ascertain the names of the persons to whom the bond house might in turn sell the bonds.

Interrogatories Under Equity Rule 58.

The record is not complete as to what took place in the trial court with reference to the interrogatories submitted by appellants under Equity Rule 58, and to which answers had not been received from plaintiffs Thompson and Williams at the time of the trial. But there is a stipulation in the record (pp. 230-232) which provides, among other things, that:

> "If either party shall hereafter desire any additional portion of the record certified to said court or printed as part of the record the same may be certified up to said Circuit Court of Appeals, and, if required, printed as a supple-

ment to the record, at the expense in the first instance of the appellants."

In view of this stipulation we feel at liberty to quote from the transcript of the record in the trial court and shall not insist on the matter being certified to this court and printed as part of the record, unless appellants question the correctness of the matter quoted.

Upon the conclusion of the taking of testimony, Mr. Driscoll for defendants, said:

"We rest, Your Honor, but prior thereto we wish to move to strike all the testimony in the record with reference to the Thompson and Williams' bonds, it having been understood at the time some slight testimony was admitted on that subject that the deposition and his answers to interrogatories would be here, and they haven't come, and we would ask that what testimony there is with reference to them be stricken."

Mr. Haga: "May I suggest, Your Honor, that it be understood that as to Thompson and Williams that the case may be disposed of as if they were simply quasi parties, and not expressly named in the Bill, because that is the only position that I see that they really could occupy in the case."

Whereupon Judge Wood, of counsel for appellants, made a statement and opposed the request for dis-

missal. Thereupon Mr. Haga, addressing himself to Judge Wood, of counsel for defendants, said:

> "I am perfectly willing that you may have whatever order you desire, Judge."
>
> The Court: "Do you desire a dismissal?"
>
> Mr. Wood: "No, we are very doubtful at this time whether we want a dismissal * *."
>
> The Court: "I don't know what relief I can give you. If you don't want a dismissal against Thompson—"

In view of the record before the trial court, we do not see how appellants can complain because the court considered Thompson and Williams in the same position as other bondholders who were not parties on the record. It will be noted that the trial court made no distinction between actual parties to the suit and *quasi* parties. Under the facts proven during the trial and the relief granted it became unnecessary to determine who held the bonds or how they acquired them. Had the court found that the validity of the bonds in any way depended on who were the holders thereof, the *quasi* parties to the suit, including Thompson and Williams, would have been required to make proof of their holdings before a Master, as was done in Galveston R. F. Co. vs. Cowdrey, 11 Wall. 459, and as is sometimes done in class suits where there is necessity for obtaining additional proof relative to the bonds held by *quasi* parties.

It is impossible to see, however, how appellants

were injured by the failure of Thompson and Williams to answer the interrogatories submitted. Their answers could not have altered the decree. If they had answered every interrogatory in the way most prejudicial to their interests it would not have affected the result in the slightest. If they had said that they acquired all their bonds by exchanging Canyon Canal Company bonds in accordance with the notice which was sent them by Corkill & Company, or that they bought their bonds from Corkill & Company, which is the only other way to which exception could be taken by appellants, it would not have altered the views of the trial court, for the other plaintiffs acquired their bonds in one or the other of the ways mentioned.

In this connection we beg to refer to the discussion in the record between counsel and the court as to appellees furnishing appellants with whatever information the bondholders committee had regarding the deposited bonds. Mr. Seymour, chairman of the committee, explained that while he had a list of the bonds that had been deposited, giving the number and denomination, he did not have the names of the persons who had deposited the bonds with the Trustee (New York Trust Company); but counsel for plaintiffs offered (Rec. pp. 187-191) to assist defendants' counsel in obtaining from the Trustee a list of the persons who had deposited their bonds and the amount of bonds deposited by each. Counsel for defendants, however, seemed to lose all interest in the matter when plaintiffs offered to as-

sist in securing the information. This apparently greatly impressed the trial court, for at the close of the day's session the court again referred to this matter, and said:

> "Before adjourning, though, Judge Wood, I suggest that if you want the names of the holders of these bonds you had better say so to counsel, and see what steps will be taken to get them for you."
>
> Mr. Wood: "I will consider that matter and present the matter tomorrow morning."

And thereafter counsel for defendants did not again refer to the subject. They were apparently entirely willing to drop the matter when they found that it would not be resisted by plaintiffs and that it would not serve to delay the trial of the case.

In view of this record no consideration should be given to the repeated statements of counsel for appellants that information to which they are entitled has been withheld from them and that they have in some way been prevented by these plaintiffs or the bondholders from obtaining information needed for their defense. They had ample time to take the deposition of the Trust Company or its officers if they desired the names of those who had deposited bonds. They could have obtained the information at the time of the trial if they had signified that they wanted it, but when plaintiffs offered to assist them in obtaining it they decided they did not want it.

There is also grave doubt as to whether the in-

terrogatories submitted come within the purview of Equity Rule 58. The discovery which appellants sought was of an inquisitorial character and related to the evidence of the plaintiffs in support of the Bill, rather than to the defenses pleaded by defendants. An examination of the Answer will show that the defense relied upon (Recond. p. 45) went to the procurement of the contract of September 12, 1911, between the District and Corkill & Company and to the fraud which it was alleged (although wholly abandoned on the trial) that Corkill & Company had committed in obtaining the contract, and none of the interrogatories pertained in the slightest degree to these extravagant charges of fraud and collusion. See annotations to Rule 58 in Hopkins, Fed. Eq. Rules, *Second Edition.* Also:

J. H. Day Co. v. Mountain City Mill Co., 225 Fed. 622.

Wolcott v. Nat. Electric Signalling Co., 235 Fed. 224.

Bonney Supply Co. v. Heltzel, 243 Fed. 399.

Gen. Electric Co. v. Independent Lamp & Wire Co., 244 Fed. 825.

Consideration Received by District for Bonds.

The contract of September 12, 1911, sets forth the history of the project, the condition it was in at the date of the contract and the full consideration to be received by the District for the bonds. Appellants' entire defense was apparently based on the theory that they would be permitted to show that the Dis-

trict had made a bad bargain and had purchased an irrigation system, which, for one reason or another, was not worth as much as the former officers believed it was. An attempt was made to show that the canals did not have the capacity and were not as substantially built as they should have been, that the incumbrances were of doubtful validity, and matters of that kind. Clearly such matters could not be tried out in this case. Neither could the court now examine into the physical condition of the project and make a reappraisement at this time of its value in 1911, and substitute the views of the court for the discretion vested in the Board of Directors.

No attempt was made to show fraud or collusion between the then officers of the District and Corkill & Company, and it was apparent to all that the officers of the District were far better advised as to the value of the property purchased than Corkill & Company could possibly be, for the District was already in possession of the system under a quit claim deed made the previous month, and the District had been organized for more than a year for the sole purpose of acquiring this system. It had had estimates made by its own engineers, as required by the District law, of the condition and value of the system and the amount it would require to purchase it and make certain necessary repairs and improvements, and these estimates had bee approved by the State Engineer, and the whole matter had been approved by the people of the District who had voted the bonds for the sole purpose of carrying out the plans that had been

adopted; and the legality of all the proceedings had in turn been approved by the District Court and the Supreme Court of the State in the confirmation proceedings (Emmett Irrigation District vs. Shane, 19 Ida. 332, 113 Pac. 444).

There being no question of fraud or collusion in the execution of the contract, the trial court was clearly right in saying: "If the directors acted within the scope of their authority we cannot relieve the District from the consequences of a bargain which may have turned out to be bad." (Record, p. 103). And in this connection we desire to say that there is not the slightest evidence that the bargain was not a good one from the standpoint of the District. It is only when the District is called upon to pay for what it wanted and received and is now using and enjoying, that it suggests for the first time that it might have been possible for it to have driven a harder bargain.

The contract itself provides that (Rec. p. 74):

> "The District is to procure from each and every person owning land within said District a waiver of errors; such waiver of errors shall be prepared by the said Adams & Candee and shall include a waiver of all errors in the proceedings relative to the organization of the said district and the issuance of the said bonds and shall consent to the levy of a tax to pay the principal and interest upon said bonds in the manner provided and intended to be provided by the laws of the State of Idaho, regardless of

the constitutionality of the Act under which said proceedings were had and such levy made or any provisions of such Act."

The substance of the waivers is set out (Record, pp. 205-207) and Mr. Shane testifies that they furnished waivers from approximately ninety per cent. of the land owners. The subsequent contracts for the sale of the bonds (Record, pp. 131-150), the calling of the special election to vote interest on the bonds in June, 1912, which was carried by 107 votes in favor and only 49 against the levy, (Record, pp. 207-208), the levying of the tax in 1913, the financial statement of the District prepared on the first of February, 1913, (Record, pp. 203-204) and certified by the Secretary and President of the District as correct and in accordance with the books of the District, stating the canals and water rights which the District acquired from the Canyon Canal Company under the contract of September 12, 1911, had a value of approximately $2,000,000.00 and scheduling the bonds now in question as "Outstanding Legal Obligations of the District", all show that the District was not dissatisfied with its bargain or questioning the value of what it received for the bonds. In fact the possibility of securing a better bargain seems to have occurred to the District only when the financial market changed so as to make it impossible for Corkill & Company to take the balance of the bonds. Then far-sighted leaders in the District probably concluded that Corkill & Company and

the holders of its then outstanding bonds could be induced to take the remaining bonds in order to avoid an attack on the bonds that they already held.

But, while it is immaterial what actuated the District in attacking the validity of the outstanding bonds when it was unable to sell the balance, the fact remains that the ratification of the contract of September 12, 1911, and the vindication of the judgment of the officers of the District in entering into that contract are most complete.

Under the contract referred to the District was to receive the fee simple title to the irrigation system, canals and water rights for $820,000.00. The provision in the contract for delivering its bonds in certain installments as Corkill & Company carried out its contract and delivered the property purchased does not change the character of the transaction. It was essentially a contract of purchase and sale of the right, title and equities of the Canyon Canal Company and of the bondholders and lien claimants in and to the irrigation system and water rights for $820,000.00 in bonds and an agreement on the part of Corkill & Company to sell the remaining bonds ($280,000.00) at par and accrued interest; and as security for the performance of the latter obligation, some of the bonds given in payment for the purchase of the system were to be held in escrow by the Fort Dearborn Trust & Savings Bank and delivered to Corkill & Company pro rata as they carried out their contract to purchase the remaining bonds.

It is true that on August 15, 1911, the Canyon Canal Company had given a quit claim deed of an interest in this system to the Emmett Bench Canal Company, the Operating Company created under the Carey Act construction contract between the Canyon Canal Company and the State of Idaho (Record, p. 176), and that the Emmett Bench Canal Company had in turn on the same day given a quit claim deed of the interest which it had received to the Emmett Irrigation District; but apparently all parties assumed that this quit claim deed conveyed nothing but the temporary right of management and operation (Record, pp. 199-200).

The deed from the Canyon Canal Company for good reasons was not deemed sufficient by the Irrigation District. It wanted a deed to the system free and clear of encumbrances and not simply a temporary right of operation under which improvements which it might make on the system would simply enhance the value of the security of the lien holders and bond holders of the Canyon Canal Company and might be swept away at any time by a foreclosure of the mortgages and trust deeds upon the system. The deed itself, of August 15, 1911, contained important reservations in the Canyon Canal Company. In addition to the right reserved to collect over $600,000.00 under the water contracts which it had issued and which were liens on the lands in the district and on the water rights and interest in the canal system purchased under such contracts, the deed contained a further reservation not mentioned in the

abstract of the deed in the record but embraced in a certificate from the Clerk of the trial court, filed with the Clerk of this Court pursuant to the stipulation hereinbefore mentioned, reading as follows: "Reserving, however, to the party of the first part for a period of five years from the date hereof the right to enlarge the canal first above described for the purpose of carrying water for power purposes or the developing of power."

There was also the claim of Trowbridge & Niver Company for several hundred thousand dollars (Record, pp. 176-177) for money advanced for the completion of the system under the Carey Act contract with the State of Idaho in excess of the amount up to that time realized from the sale of water rights, and while the claim was referred to in the contract as "unsecured", to distinguish it from the claims secured by mortgages on the system, it was, nevertheless, an obligation that was being pressed and it was contended that it was a lien under the Act of Congress of June 11, 1896, amending the Carey Act, which provides that:

> "A lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, *for the actual cost and necessary expenses of reclamation* and reasonable interest thereon from the date of reclamation until disposed of to actual settlers."

Corkill & Company under the contract of September 12, 1911, agreed to deliver to the District the said irrigation system free and clear of the reservations contained in the previous quit claim deed of the Canyon Canal Company and free from any *defect* there might be in such a deed; free and clear of the claims of Trowbridge & Niver Company, free and clear of the claim of the bondholders and lien claimants of the Canyon Canal Company, aggregating about $600,000.00, and to release the outstanding water contracts which appellants now contend took substantially the entire capacity of the system and on which there was due and collectible at the time of the contract over $600,000.00. For turning over these rights and interests in the system and water rights the District agreed to pay $820,000.00 in bonds at par.

Corkill & Company, apparently realizing the difficulty of selling such a large block of bonds for cash and taking the cash to pay the obligations of the Canyon Canal Company, conceived a plan which was entirely proper and usually resorted to in business transactions of large magnitude. They provided that the bonds of the District to be delivered in payment for the system, as well as those that were to be sold for cash, were to be deposited with the Fort Dearborn Trust & Savings Bank; and with the same depositary they agreed to deposit the title papers, releases and deeds conveying to the District the free and unincumbered title to the system. They then persuaded the Canyon Canal Company to accept

bonds of the District in payment for its interest in the system, and the Canal Company in turn, with Corkill's assistance, persuaded the holders of the Canyon Canal Company's bonds and securities to accept payment from the *Canyon Canal Company* in Irrigation District bonds.

Appellants are clearly wrong in assuming and arguing that the Irrigation District ever exchanged any of its bonds for bonds of the Canyon Canal Company. The contract under which the bondholders of the Canyon Canal Company deposited their bonds and agreed to accept Irrigation District bonds in satisfaction of their claims shows clearly that they were dealing with the *Canyon Canal Company.*

This contract (Record, pp. 150-153) states, that:

> "Whereas, arrangements have been made for the purchase by the said Emmett Irrigation District of all of the properties of the said Canyon Canal Company and the delivery of certain of the bonds above mentioned in payment therefor to an amount sufficient *to enable the said Canyon Canal Company* to exchange bonds of the said irrigation district for all of the outstanding bonds and notes of the said Canyon Canal Company."

Clearly those who exchanged Canyon Canal Company bonds for Irrigation District bonds were dealing with the *Canyon Canal Company* and not with the District. The latter did not receive any of the bonds of the Canyon Canal Company. They were turned over by the Canyon Canal Company to the

Trustee under its mortgages, and the Trustee in turn released the mortgages and cancelled the bonds, and the *release* was delivered to the Emmett Irrigation District in connection with the deed to the system.

The learned trial court could see no objection to the procedure that was followed in passing the free and unincumbered title from the Canyon Canal Company to the District, and we submit there is none. The proceeding was clearly within the express terms of the statute. The District was only buying canals, water rights and irrigation works. That is what it planned to get at the beginning, and that is what it had when the transaction was closed, and its bonds went direct from the District to the Canyon Canal Company and Corkill & Company. It knew no other parties in the transaction. It had no dealings with the creditors of the Canyon Canal Company. The procedure followed by the Canyon Canal Company and Corkill & Company to obtain the release of the Canyon Canal Company's obligations did not concern the District. In some cases cash may have been used by Corkill & Company or the Canyon Canal Company, but undoubtedly in most cases they were successful in effecting exchanges; but so far as the Canyon Canal Company creditors were concerned, they were dealing directly with the debtor Company and not with the District.

There is no occasion here for going beyond the express provision of the statutes, as was done in the cases cited below where the transactions were held entirely legal:

Wash.-Ore. Corporation v. City of Chehalis, (Wash.) 136 Pac. 681, 683.

O'Neill v. Yellowstone Irr. Dist., 44 Mont. 492, 121 Pac. 283.

Kinkade v. Witherop, 29 Wash. 10, 69 Pac. 299.

District Estopped by Its Conduct and the Recitals in the Bonds.

The bonds, after stating that they are issued by authority of the Irrigation District Act, contain the following certificate or recital:

> "And it is hereby certified that all things required by law to be done in and about the organization of said district and the issuance of the said bonds have been done, have happened and have been performed, and that the issuance of this bond has been duly and legally authorized by vote of the electors of said district at a special election duly called and held in accordance with the provisions of the said Act and by resolution of its Board of Directors, and that all other acts, conditions and things required by the laws and constitution of the State of Idaho precedent to and in the issue and delivery of this bond have been done, have happened and have been performed, and that said bonds are the valid, binding and legal obligation of the said district, that all the real property included within said district is subject to the levy of an annual tax for the payment thereof."

The foregoing certificate is made over the signature of the President and Secretary and the seal of the District, and we respectfully submit that the District cannot, while retaining the benefits of the transaction and using and enjoying the property received, be permitted to set up the falsity of the certificate and show that neither it nor its officers have done what they certified they had done. No fraud or collusion having been shown, the District officers now in office will not be permitted to totally disregard the certificate of their predecessors.

See the recent decision of the Circuit Court of Appeals of the 8th Circuit, in Shelton v. Gas Securities Co., 239 Fed. 653, a case involving irrigation district bonds under the Colorado statute.

Abbott in his work on Public Securities, Section 276, in discussing the doctrine of recitals, as to facts, says:

> "Their recitals or statement in the bonds issued by the public corporation that they have been so complied with or that certain facts or conditions exist, is conclusive of the matter so stated and recited and binding on the corporation for, as said by the Supreme Court of the United States: 'The recital is itself a decision of the fact by the appointed tribunal.' * * * In Burroughs on Public Securities, page 305, the author states what he deduces as the three leading points of the municipal decision:
>
> 'I. The powers of the officers to decide that the conditions of issue have been fulfilled, is an

implied one, deduced from the supposed necessity of the case that some one must decide before issue.

'II. The evidence of the decision of the officers is to be found in the recital in the bond. This is the record of the decision, and a general recital that the law under which the bonds have been issued, has been complied with, is a decision that the precedent conditions have been fulfilled.

'III. Such a decision is conclusive upon the municipality as to a bona fide holder of its bonds, who is not bound to look for further evidence of compliance with the conditions of issue. The recitals or statements work no estoppel, however, except where made by those officials or that tribunal especially designated by law or having the general power to perform such acts. If made by those having no authority to decide and assert the facts which constitute the conditions precedent to the legal issue of bonds, the recitals will not be accepted as a substitute for proof.' "

Some of the leading cases on the subject of the binding effect of recitals are cited in the "Brief of the Argument", and we shall not extend the discussion here, except to call attention to the recent case before the Circuit Court of Appeals for the Sixth Circuit, entitled Town of Newbern vs. National Bank of Barnesville, 234 Fed. 209, where the bonds were held valid, although the officers of the town had failed to

comply with substantially every requirement of the law. Whereas in the case at bar, there has in fact been a more strict compliance than is usually found in the issuance of municipal securities, and we have the added weight, which the record shows greatly influenced purchasers, that the bonds had been held valid by the Supreme Court of the State. It should be noted also that in the State of Idaho the Irrigation District Law has uniformly received a very liberal construction in favor of the validity of the securities. While the Supreme Court of the State has in numerous decisions confirmed the validity of the securities, it has never held a single bond issue invalid.

We want to call the Court's attention particularly to the case of Page vs. Oneida Irrigation District, 26 Ida. 108, 141 Pac. 238. We believe this case disposes of practically every question involved in the case at bar, and, as stated by the learned judge of the Trial Court, it was unnecessary to go as far in this case as did the Supreme Court of Idaho in that case.

Page was a land owner in the Oneida District. He brought suit to remove a cloud from the title to his property arising from the acts of the District in making four bond issues, dated, respectively, January 1, 1903, 1906, 1907 and 1910, and from making several tax levies for the purpose of doing construction work, for which bonds had been issued, and for paying interest on the several bond issues. It was alleged and proven that the bonds of the issue dated January 1, 1903, were used in payment for labor and

services performed for the District and materials furnished in the construction of the works, and that some of them were sold by a broker who was allowed a commission of ten per cent. for making the sale. Substantially the same facts were shown with reference to the other issues. In the case of at least one issue the President in office at the time the bonds were dated went out of office before signing the bonds, and after a lapse of several months or a year after he ceased to be an officer of the District he signed the bonds, with the consent, knowledge and approval of the then officers. The bonds in each case bore interest from date, and matured with reference to their date and without regard to the date of their delivery by the District. They were usually delivered long after the date of the bonds. In the case of the bonds dated January 1, 1903, they were sold in installments from time to time throughout the year 1904 and as late as September 21, 1905.

Attached to the Bill as exhibits were lists showing the date and the number of the bonds that were issued to those who had taken them in exchange for labor and supplies, many of whom had in turn disposed of them to others. Plaintiff offered to do equity and alleged that it was impossible for him to determine what obligations of the District were valid and what were invalid, or the amount of the liens that had been created or attempted to be created against his land because of the condition of its records and the manner in which its bonds had been issued, exchanged and sold; but he offered to pay whatever taxes should

be found to be valid and subsisting liens or necessary to pay interest on the legally issued and outstanding bonds. None of the bondholders were parties to the suit and no proof was made as to how many of the bonds were in the hands of innocent holders for value, or who actually held the bonds at the time of the suit. The form of bond was in evidence, from which it appeared that all bonds were negotiable instruments embodying recitals substantially the same as do the bonds now before the Court in this case. Plaintiff had paid no taxes since the year 1908 and had done nothing to in any way recognize the validity of the last issue of bonds; but it appeared he had accepted a small amount of the first issue in exchange for labor performed for the District.

The court found the facts substantially as alleged in the complaint, and also found that the board had always acted in good faith and that there had been no fraud or collusion; that plaintiff had received and would receive as a land owner in the district the benefits of the property acquired by the district from the proceeds of the bonds, or in exchange therefor; that the bonds were negotiable and had in many cases been sold by the original purchasers. It held that plaintiff was estopped from questioning the validity of the bonds, and in effect found and decreed that the bonds were legal and valid obligations of the District, and that it was the duty of the district to levy the taxes from year to year to pay the interest thereon.

The case illustrates the attitude of the Supreme

Court of the State of Idaho towards irrigation districts and irrigation district bonds, and the extent to which it will go to prevent repudiation of obligations by irrigation districts or the taxpayers thereof and protect the integrity of negotiable instruments issued by public corporations.

In this connection we want to refer briefly to the law of negotiable instruments in the State of Idaho.

Law of Negotiable Instruments in Idaho.

Idaho has adopted the uniform Negotiable Instruments Law, and we deem it unnecessary to quote the statutes at length on that subject, as that Act is readily accessible.

Section 59 of the Act (Section 3516, Idaho Revised Codes) provides that:

> "Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was *defective*, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course * * *"

Every holder of the Emmett Irrigation District bonds is entitled to the benefit of the presumption created by the above statute. He is presumed to be a holder in due course, and that presumption cannot be overcome except by evidence showing that the title of a former owner was *defective*. When that has been shown, the holder of the instrument must

prove that he, or some one under whom he claims, acquired the instrument "in due course."

Section 55 of the Act (Section 3512, Idaho Rev. Codes) defines what constitutes "defective title" within the meaning of the preceding section. This section reads as follows:

> "The title of a person who negotiates an instrument is defective within the meaning of this title when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to fraud."

Have the defendants shown that any person who has negotiated the Emmett bonds comes within the terms of the above statute? Has it been shown that any one obtained the bonds, or any signature thereto, by fraud? By duress? By force? By fear? Or by other unlawful means? Or for an illegal consideration? Or that any one has negotiated the bonds in breach of faith? Or under such circumstances as amount to fraud? The most that can be said for appellants' case is that they attempted to prove *inadequate or partial consideration;* but the Trial Court very properly held that it could not substitute its judgment for the discretion vested in the Board, and in the absence of fraud or collusion the District could not show that it had made an unwise bargain.

The Supreme Court of Idaho, in Winter vs. Nobs, 19 Ida. 18, 112 Pac. 525, in considering the Idaho statutes quoted above and the presumptions in favor of the holder of negotiable instruments, said:

> "It is contended by appellant that mere suspicious circumstances are not sufficient to put a purchaser of a note on inquiry, and that it is necessary, in order to defeat his right of recovery, to either show actual notice of the fraud or notice of such facts and circumstances as would charge him with actual bad faith in taking the paper without investigating the circumstances under which it was issued. In support of this position, counsel rely on Section 3513, Revised Codes (Section 56, N. I. L.), which reads as follows: 'To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.' We readily agree with this contention. We think it is only actual knowledge of the defect or infirmity, or notice of such facts and circumstances as would put a man on inquiry and would charge him with bad faith or the imputation of dishonest dealing, that was intended by the statute to defeat a recovery. This view is abundantly supported by the authorities."

The Court then quotes from a number of cases, including the following from Gray vs. Boyle, 55 Wash. 578:

> " 'The holder is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance. He does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's right cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fides*, his title, according to settled doctrines, will prevail.' "

And the court then adds:

> "We are in full accord with this construction of the law."

The same rule was applied in Vaughn vs. Johnson, 20 Ida. 669, 119 Pac. 879, and in Town of Newburn vs. National Bank of Barnesville, heretofore cited, under the same Act (Negotiable Instruments Law).

See also Shelton v. Gas Securities Co., 239 Fed. 653, 152 C. C. A. 487.

Counsel for appellants admit that they do not know of a single bond in the hands of a person who is not a holder for value in due course. They admit that if all the bondholders should appear in court with their bonds the appellants could not say which bonds had been delivered at par and accrued interest for cash or for payment for the irrigation system, or for any of the other considerations which they say were contemplated by the agreement of September 12, 1911. They admit they have no evidence with which they can attack any particular bond, and they have no further evidence than what is now before the Court relative to the transactions complained of.

What valid reason can be urged therefore for denying relief to the bondholders who are now before the Court, or the other bondholders whom they represent as members of the class? Over five years have elapsed since the transactions complained of took place. How much more time should appellants have in which to obtain evidence to show their own misconduct and the irregularities of their own officers? Manifestly the time consumed in this litigation is not worrying appellants, who have the full use and enjoyment of the irrigation system, while the bondholders have had no interest for five years.

The Trial Court entered the only form of decree that should be entered. Plaintiffs introduced one bond for the purpose of showing the terms of the contract. They also produced at the trial all the bonds held by plaintiff Gaebler, aggregating $47,-

500.00, and offered to produce the bonds of all the plaintiffs in the suit for purposes of examination; but as the bonds were not due and as they simply sought to remove a cloud from the title, it seemed unnecessary to formally introduce them in evidence and leave them as part of the records of the Court. Plaintiffs also introduced all the coupons belonging to the bonds in suit, not simply the coupons belonging to the Gaebler bonds, as stated on page 16 of appellants' brief.

It being clear that appellants had produced all the evidence they had against all the bonds, and it being necessary for the Court to determine what bonds were valid and what were invalid, and to determine the proportionate part that plaintiffs were entitled to receive out of the trust fund in the hands of the treasurer, it entered the only decree that could be entered under the evidence and the laws of the State of Idaho as construed by its highest Court.

Respectfully submitted,

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